BEFORE THE
STRUCTURAL PEST CONTROL BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

| | |
|---|---|
| In the Matter of the Accusation Against:<br><br>SELECT PEST CONTROL<br>SOREN AXEL HOY, President<br><br>Company Registration Certificate No. PR 170<br>Operator License No. OPR 6525<br><br>Respondent. | Case No. 2014-36<br><br>OAH No. 2014030173<br><br>ORDER OF DECISION |

**DECISION**

The Proposed Decision of Kirk E. Miller, Administrative Law Judge, dated June 17, 2014, in Oakland, is attached hereto. Said decision is hereby amended, pursuant to Government Code section 11517(c) (2) (c) to correct technical or minor changes that do not affect the factual or legal basis of the proposed decision. The proposed decision is amended as follows:

1. On page 1, paragraph number 2, "Executive Director" is stricken and replaced with "Executive Officer".

2. On page 1, under FACTUAL FINDINGS, paragraph number 1, "June 30, 2014" is stricken and replaced with "June 30, 2017".

3. On page 4, paragraph number 15, "the citation was came back marked" is stricken and replaced with "the citation came back marked".

4. On page 9, paragraph number 1, insert "Soren Axel Hoy" in front of "President".

The Proposed Decision as amended is hereby accepted and adopted as the Decision and Order by the Structural Pest Control Board, Department of Consumer Affairs, State of California.

This Decision shall become effective on August 15, 2014.

IT IS SO ORDERED July 16, 2014.

FOR THE STRUCUTRAL PEST CONTROL BOARD
DEPARTMENT OF CONSUMER AFFAIRS

BEFORE THE
STRUCTURAL PEST CONTROL BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

| | |
|---|---|
| In the Matter of the Accusation Against:<br><br>SELECT PEST CONTROL<br>SOREN AXEL HOY, President<br><br>Operator License NO. OPR 6525<br>Company Registration Certificate No. PR 170<br><br>Respondent. | Case No. 2014-36<br><br>OAH No. 2014030173 |

**PROPOSED DECISION**

Administrative Law Judge Kirk E. Miller, State of California, Office of Administrative Hearings, heard this matter on May 6 and May 21, 2014, in Oakland, California.

Kim M. Settles, Deputy Attorney General, represented complainant Susan Saylor, Registrar/Executive Director of the Structural Pest Control Board (Board), Department of Consumer Affairs.

Todd C. Hedin, Attorney at Law, represented Select Pest Control and Soren Axel Hoy, president. Mr. Hoy was present.

The matter was submitted on May 21, 2014.

FACTUAL FINDINGS

1. On September 12, 1981, the Structural Pest Control Board issued Operator License No. OPR 6525 to Soren Axel Hoy (respondent). On March 16, 1982, Operator's License No. OPR 6525 was changed to President and Responsible Natural Person of Select Business Investment, Inc. DBA Select Pest Control. The license will expire on June 30, 2014.

2. On February 3, 1987, the Structural Pest Control Board issued Company Registration Certificate No. PR 170 to Select Pest Control, Soren Axel Hoy, Owner.

*The Accusation*

3. Complainant seeks revocation or suspension of Select Pest Control's (Select) Registration Certificate and of respondent's Operator's License, because respondent did not provide access to Select's business records or to its premises, when the Board's inspectors sought to conduct licensing inspections in accordance with Business and Professions Code section 8652.[1] The Accusation also alleges respondent acted as a licensee at a place of business other than that registered with the Board.[2]

*Complainant's Evidence*

2007 and 2009 INSPECTIONS BY MARIN COUNTY DEPARTMENT OF AGRICULTURE

4. The Board has delegated the responsibility for inspection of licensees located in Marin County, to the Marin County Department of Agriculture (MCDA). Laurel Thomassin is a supervising inspector who has worked for MCDA for 17 years, during which time she has performed hundreds of inspections. Thomassin described her attempts to inspect respondent's business premises, and his books and records, in 2007 and in 2009.

5. When Thomassin attempted an inspection in 2007, respondent refused to cooperate, became angry and yelled at her in such a manner as to cause her to have concern about her safety. He refused to permit the inspection, and it did not occur. Thomassin returned with two colleagues on July 9, 2009, again to perform a routine inspection. Because of her experience in 2007, another colleague, Scott Wise, videotaped this inspection attempt. Once again, respondent refused the inspection, became extraordinarily angry, cursed the inspectors, said they were wasting his time, and told them he would not submit to an inspection unless they had an appointment. The video was played at hearing and demonstrated the inspectors acted with restraint and courtesy, and respondent was aggressive and threatening. The 2009 inspection was not completed.

6. With respect to this inspection, Wise credibly testified that no one from MCDA attempted to confront respondent physically during the visit.

7. Wise stated that appointments are sometimes made as a courtesy to licensees, but there are concerns about doing so. The purpose of an unannounced inspection is to get a "snapshot" of the business; when a licensee knows an inspection will occur, it is possible to "manufacture" training records, without having actually provided the training, or "create" other compliance records for the inspection.

---

[1] All references are to the Business and Professions Code unless otherwise indicated.

[2] At the hearing, Complaint amended the Accusation to add "The Marin County Department of Agriculture Weights and Measures ceased attempts to inspect respondent's premises in 2009 out of fear of personal safety of its inspectors.

OTHER MCDA EXPERIENCE

8. Wise was also present when respondent came to MCDA's office. Because of respondent's conduct at this office, his presence raised concerns about employee safety. In 2010 a new MCDA director tried to constructively engage with respondent, but during a conversation in an open office area, respondent became angry, slammed the door and "left in mid-sentence." Because of safety concerns, MCDA employees were given advance notice if respondent was expected to be in the office.

9. MCDA has only two inspectors. Because of respondent's noncompliance with its inspection attempts, it requested the assistance of the Department of Pesticide Regulation's (DPR) Northern Enforcement Branch.

2011 AND 2013 INSPECTIONS BY THE BOARD'S INSPECTORS

10. Thomas Ineichen has worked as a board inspector for 17 years. In June 2011 he was contacted by the MCDA regarding respondent's refusal to permit MCDA to perform inspections of his equipment, books and records. Thomassin, described her prior inspection attempts with respondent and told Ineichen that she would not undertake additional inspections because she feared for her safety when dealing with respondent.

11. Ineichen described the records the DPR inspectors review during a routine inspection, and stated such inspections can take from one to four hours. The focus of the inspections is public protection. He tried to provide this explanation to respondent when attempting the inspections.

12. Ineichen visited respondent's address of record on Lincoln Avenue in San Rafael, on September 21, 2011. The address was for a multiunit building and Select was not a business listed on the building registry. Ineichen asked another building tenant where it was located and was given a suite number. He was unable to locate Select where he was directed. Ineichen attempted to call respondent but only reached respondent's voicemail. When Ineichen received a return call, he posed as a customer requesting help in identifying an insect and asked if he could bring it in for evaluation. He was advised that would not be possible, and he should mail the insect to Select's post office box.

13. Ineichen returned to the property on December 13, 2011 and observed respondent's trucks in the parking lot. He saw a respondent on a balcony overlooking the parking lot, and respondent confirmed that he was the licensee. Ineichen advised respondent he was an inspector and requested to review respondent's records and business activities. Respondent asked why he did not have an appointment, and Ineichen explained the difficulties he had encountered in reaching respondent. Ineichen offered to return later in the day, but respondent told him that he would not submit to an inspection without an appointment. Ineichen made an appointment to return the following day to conduct the inspection.

14. Ineichen returned the following day, presented his identification badge, and explained the inspection process. Ineichen was able to enter respondent's suite, but respondent refused to provide Ineichen with Select's insurance or bond information. Respondent became aggressive and Ineichen asked him to calm down and inquired if he was going to be cooperative. Respondent told Ineichen to "get out" and became so hostile that Ineichen terminated the inspection attempt. Respondent slammed the door behind Ineichen as he left the premises.

15. On December 11, 2012, the Board issued a citation against respondent in the amount of $1,500 for a violation section 8652, failure to make records available to an authorized representative. The citation was sent to respondent on three different occasions by certified mail, to the address respondent had on record with the Board, but in each case the citation was came back marked "return to sender unclaimed, unable to forward." The citation was ultimately paid a year later on November 16, 2013.

16. Ineichen again attempted to perform an inspection on July 17, 2013. On this occasion he was accompanied by Donald Tsue and Johnie Pieratt, law enforcement officers from the Department of Consumer Affairs, Division of Investigation. When Ineichen arrived at the premises, he found that the building directory now included a listing for "201- Select Pest Control," but that no unit was found with a matching number. Ineichen observed respondent going from one of his trucks toward the building, and he approached respondent to identify himself and the others who were with him. Ineichen started to make a request to inspect respondent's books and records, when he was interrupted and told to "make an appointment." Ineichen attempted to explain the law did not require an appointment, when he was again interrupted, and told by respondent to "leave my property or I will call the police." Tsue testified Ineichen greeted respondent cordially, but in response respondent heaved his chest and showed anger, at which point Tsue felt Ineichen was in danger and begin to engage with respondent himself. Respondent called the local police who arrived. Respondent again refused to permit an inspection, and Ineichen left a notice of violation.

17. Ineichen testified that he has previously supervised licensees on probation, and given this experience and respondent's "defiant" conduct, he does not believe respondent is a good candidate for a probationary license.

*Respondent's Evidence*

18. Respondent testified in his own behalf, and stated that after serving for 10 years in the Navy, he studied pest control at the University of California, Davis, for one year, before entering the pest control business in 1969 or 1970. About five years later, he went into business for himself.

19. Respondent stated Select has never been listed on the building register, because an elderly woman works in the office and he does not want "walk in traffic." Customers get in touch by telephone. He pointed out that the Board's change of address form does not include a separate space designated for a suite number.

20. Respondent testified regarding the attempted inspections at his place of business. In one instance, respondent testified an MCDA agent "grabbed him by the arm and spun him around." Respondent has called the local police "four or five times" because "they have better manners." Respondent does not cooperate with unannounced inspections because he does not believe there is a legal basis for them, and the inspectors have never provided written authority satisfactory to respondent confirming this authority. When unannounced inspections are attempted, his practice is to tell inspectors they need an appointment.

21. Respondent acknowledges that Ineichen had made an appointment when he came back to inspect on December 14, 2011. At that time, Ineichen asked for proof of insurance. Respondent told him that document had previously been provided and that Ineichen was "wasting [respondent's] time." Respondent considered the encounter "harassment." However, respondent also stated that if in the future inspectors would make appointments he is "willing to be inspected."

22. Respondent stated he provided access to his suite to the Board inspectors, even though he did not feel they provided adequate identification. He denies he slammed the door or raised his voice, and believes he was wrongly treated as a "bad person" when "cops, guns and badges" were presented.

23. Approximately eight or nine years ago an MCDA inspector named Fred Crowder made appointments and provided respondent a list of what he needed to see. Respondent stated he keeps records, files monthly pesticide use reports with the county and files an annual registration report. He said his insurance company sends a certificate of insurance to the Board and to MCDA.

24. Respondent testified that MCDA inspectors have requested to observe the application of pesticides while he is on a jobsite. In such situations, he advises the inspectors they must first get the approval of the homeowner, because he is working on private property, and homeowners do not like the intrusion. He has called the local police when inspectors have refused to leave. Respondent believes these field inspections have caused him to lose accounts.

25. Respondent testified that he feels singled out for harassment and believes he may be followed by unmarked state cars. As evidence of harassment, he pointed to an incident in which a gardener had chemicals in his truck for which he was not licensed, but he was not cited.

*Costs*

26. Complainant has incurred investigation costs in the amount of $1,062, and legal fees for services from the Attorney General's Office in the amount of $5,390, in connection with this matter. In the absence of any evidence or argument to the contrary, these costs are found to be reasonable.

27. The case of *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32 sets forth the factors to be considered in determining the reasonableness of costs. Those factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of her or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay and whether the scope of the investigation was appropriate to the alleged misconduct. These factors have been evaluated and are not found applicable in this case.

*Discipline Considerations*

28. In addition to the December 11, 2012 citation for violation of section 8652 in the amount of $1,500, respondent was citied in 2002 for violation of Food and Agriculture section 12973 in the amount of $500.[3]

## LEGAL CONCLUSIONS

*First Cause for Discipline: Failure to Make Records Available to the Board*

1. Section 8620 provides the Board may suspend or revoke the license when it finds that the holder has committed any acts or omissions constituting cause for disciplinary action.

Section 8652 states:

> Failure of a registered company to make and keep all inspection reports, field notes, contracts, documents, notices of work completed, and records, other than financial records, for a period of not less than three years after completion of any work or operation for the control of structural pests or organisms, is a ground for disciplinary action. These records shall be made available to the executive officer of the board or his or her duly authorized representative during business hours.

California Code of Regulations, title three, section 6140, subdivision (b), provides:

> Each person responsible . . . for preparing and maintaining records shall make those records available to the Director or

[3] This section provides: "The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner."

commissioner during business hours upon demand of the director or Commissioner. The required records include:

(1) Records concerning work hours, training and medical monitoring of employees;

(2) Pest control recommendations and pesticide use and operations records; and

(3) Pesticide transaction, sales and delivery records.

Pursuant to section 8620 as that provision relates to section 8652, by reason of the matters set for in Findings 5 through 17 and 21, cause exists for disciplinary action against respondent's license and registration.

*Second Cause for Discipline: Address of Record*

2. Section 8650, subdivision (b), provides:

Acting in the capacity of a licensee of registered company under any of the licenses where registrations issued hereunder except:

(b) At the address and location or place or places of business as a licensed or registered or as later changed as provided in this chapter is a ground for disciplinary action.

Pursuant to section 8620 as that provision relates to section 8650, by reason of the matters set forth in Findings 12, 15 and 16, cause exists to discipline respondent's license and registration.

3. Respondent argues that no discipline should be ordered in this case, because the law does not authorize random inspections of a licensee without inspectors first making an appointment. Respondent bases this position on the fact that section 8652 only requires records to be made available "during business hours," and while regulation section 6140 states records are to be available "upon demand of the director," neither section requires such records to be made "immediately available." This interpretation is inconsistent with the usual meaning of "upon demand," and equally as important, it is inconsistent with the statute's and regulation's regulatory purpose, which is to provide an opportunity to inspect licensee's activities at any time, without the licensee having an opportunity to update or cure improper record keeping or business practices.

4. Respondent also argues that the accusation should be dismissed because it does not assert any problems exist with his records. Inasmuch as respondent has not permitted any inspection of his records, no record issues were identified. But the evidence was that since at least 2007, respondent consistently frustrated all attempts to conduct the

required record inspections. Respondent asserts this problem could have been avoided had the inspectors been able to provide evidence satisfactory to him that the right to inspect without notice exists, or if they had been gentler in their approach. All of the evidence is to the contrary. Every time an inspection was undertaken, respondent met polite inquiries with anger and aggression, to the point that it was necessary for law enforcement officials to accompany the inspectors for their protection. And the inspectors used reasonable efforts to explain the basis for their inspections.

5. Respondent argues that he did not violate section 8650, because the Board's address form does not specifically require the use of a suite number. The purpose of the form is to permit the licensing unit to locate its licensees, and respondent's own testimony was that he was making his location difficult to find. Respondent's business name was not posted on its door and until 2013 it was not posted on the building register. In addition, respondent did not answer the telephone. In the absence of respondent providing a suite address, the 2011 citation could not be delivered and inspectors had great difficulty finding Select in 2011 and 2013.

6. Finally, respondent argues that he is simply a strong individual who should not be penalized for asserting his personal rights and standing on principle. While such conduct is generally to be respected, it was not shown to be present here. When given a reasonable explanation of what the law requires, respondent not only rejected it, but did so in a manner that shielded his business from mandatory inspections and reasonably caused others to believe that they were placed at risk just by discharging their job responsibilities. Respondent's misconduct continued between 2007 and 2013, when the last attempt to inspect Select was made. Respondent testified at hearing he will now permit inspections when appointments are made, but this misses the point: The law does not require inspectors to make appointments. When an individual chooses to work in a business or occupation requiring a license, and when the occupation or business is subject to regulatory oversight, the individual or business must accept the burdens of regulation along with the privilege of licensure. In this case, that burden is an unannounced, periodic inspection of books and records that may last from one to four hours. In light of the citation previously issued to respondent regarding his failure to provide access to Select's records for inspection, respondent's repeated, hostile refusal to comply with the modest regulatory burden imposed by section 8652, and respondent's continuing demand that appointments be made as a condition of performing inspections, respondent is unfortunately not a good candidate for a probationary license, and the protection of the public requires revocation.

*Costs*

7. Pursuant to section 125.3, the Board may request the administrative law judge to direct a licensee found to have violated the licensing act to pay a sum not to exceed the reasonable costs of investigation and prosecution. As set forth in Finding 26, the Board incurred $6,452 in investigating and enforcing this matter.

ORDER

1. Operator License No. OPR 6525 issued to President and Responsible Natural Person of Select Business Investment, Inc., DBA Select Pest Control is revoked.

2. Company Registration Certificate No. PR 170 issued to Select Pest Control, Soren Axel Hoy, Owner, is revoked.

3. Soren Axel Hoy, Owner, shall pay the Board its investigative and enforcement costs in the amount of $6,452.

DATED: June 17, 2014

KIRK E. MILLER
Administrative Law Judge
Office of Administrative Hearings